IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 09-0522

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROLAND DEE TIREY,

Defendant and Appellant.

RESPONSE IN OPPOSITION TO MOTION FOR RECUSAL

The State of Montana opposes Tirey's Motion for Recusal of Chief Justice McGrath.

I. FORMAL SUPERVISORY AUTHORITY IS AN INSUFFICIENT BASIS FOR DISQUALIFICATION OF A JUDGE WHO IS A FORMER PUBLIC OFFICIAL.

Rule 2.12(A) (5) (b) of the Montana Code of Judicial Conduct provides:

> A judge shall disqualify himself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: . . . The judge . . . served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy . . . .

Interpreting this Rule, this Court has stated:

> . . . Chief Justice McGrath, having previously served as the Attorney General, is only required to disqualify himself from cases in which he, as Attorney General, participated personally and substantially or in which he expressed an opinion concerning the merits of the matter in controversy.

> The vast majority of criminal appeals that come before this Court are initiated by defendants. The fact that Chief Justice McGrath's name appears on the State's answer

> brief as the Attorney General, does not itself serve to trigger a disqualification of Chief Justice McGrath. Rather, he must, on a case-by-case basis, determine whether he, personally and substantially, participated in the case in question.

State v. Ellis, 2009 MT 58, ¶¶ 3-4, 349 Mont. 317, 206 P.3d 564 (emphasis added).

These authorities establish clearly that formal supervisory authority over staff members in the Attorney General's Office is an insufficient basis on which to seek disqualification of Chief Justice McGrath. See Motion for Recusal, at 4 (referring to "supervisory oversight" over individuals who appeared before the legislature as proponents of legislation). Tirey has made no showing that Chief Justice McGrath participated "personally and substantially" in legislative actions relevant to this appeal.

II. PARTICIPATION IN A LEGISLATIVE PROCEEDING IS NOT DISQUALIFYING.

In any event, Chief Justice McGrath's alleged participation as a public official in legislative activities cannot be equated to participation in a judicial "proceeding" for purposes of disqualification. Such an interpretation would unnecessarily disqualify former legislators as well as former executive branch officials from participating in cases involving statutes that were adopted or amended with their participation.

Rule 2.12(A)(5)(b) refers specifically to disqualification of a judge "in any proceeding" in which the judge "participated personally and substantially as a lawyer or public official concerning the proceeding" or "publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy." (Emphasis added.) In the context of the Rule, it is evident that a judge's prior participation or expression of opinion, in order to

be disqualifying, refers to a particular judicial controversy, not a legislative action that preceded the judicial action in controversy.

This interpretation accords with numerous cases in which judges and appellate court justices have declined to disqualify themselves from judicial proceedings. In perhaps the best-known such case, Justice Rehnquist declined to disqualify himself from participation in a U.S. Supreme Court appeal based on his congressional testimony as an employee of the U.S. Department of Justice concerning the authority of the Executive Branch to gather information. Laird v. Tatum, 409 U.S. 824 (1972). Justice Rehnquist stated:

> Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.
>
> . . . [I]t would be unusual if those coming from policymaking divisions in the Executive Branch, from the Senate or House of Representatives, or from positions in state government had not divulged at least some hint of their general approach to public affairs, if not to particular issues of law.
>
> The fact that some aspect of [the propensities of Supreme Court Justices] may have been publicly articulated prior to coming to this Court cannot, in my opinion, be regarded as anything more than a random circumstance that should not by itself form a basis for disqualification.

409 U.S. at 835-36 (footnote omitted).

Other appellate judges have agreed with Justice Rehnquist's reasoning. For example, in Buell v. Mitchell, 274 F.3d 337 (6th Cir. 2001), the Sixth Circuit found no error in a trial judge's refusal to recuse himself on the grounds that, as a state senator, he had sponsored the bill restoring the state's

death penalty. Citing cases from Massachusetts, Georgia, and Alabama, as well as the Sixth Circuit, the court found that "[o]ther courts have explicitly held that judges are not disqualified from hearing cases involving legislation they had voted upon or drafted before serving on the bench." 274 F.2d at 346 (citations omitted); see also Baker & Hostetler LLP v. U.S. Dept. of Commerce, 471 F.3d 1355, 1358 (D.C. Cir. 2006) ("[J]udges who previously participated in policy matters and provided policy advice in government do not ordinarily recuse in litigation involving those policy issues."); Wessmann v. Boston School Committee, 979 F. Supp. 915, 916-17 (D. Mass. 1997) ("The fact that a judge actively advocated a legal, constitutional or political policy or opinion before being a judge is not a bar to adjudicating a case that implicates that opinion or policy.")

Taking a position on legislation, indeed, drafting legislation, before becoming a judge, is not a basis for recusal in a case involving that legislation.

III. "JESSICA'S LAW" HAS NOTHING TO DO WITH THE ISSUES IN THIS CASE.

Finally, Tirey's motion relies in large part on the Chief Justice's alleged participation in hearings that have nothing to do with this case. See Motion for Recusal at 2-3, 5; Reply Brief of Appellant at 15-19 (referring at length to hearings on S.B. 547, 60th Leg., Reg. Sess.). Senate Bill 547, enacted as 2007 Mont. Laws ch. 483, did not adopt or amend either of the two provisions of the Code on which the State relies--Mont. Code Ann. § 46-18-203(7)(a)(iii) and Mont. Code Ann. § 46-18-203(9)--and is irrelevant to the State's argument. See 2007 Mont. Laws ch. 483, § 15.

The State's brief relied on the 2007 version of the Montana Code Annotated because that was the Code in effect at the time Tirey violated his

probation, not because there were any relevant 2007 amendments to the statutes. See Brief of Appellee at viii (referring to 2001 and 2003 session laws, but not 2007); 25 ("Because his revocation proceeding was initiated based on acts and omissions in November and December 2008, the 2007 version of the Code applies."). Tirey's repeated references to 2007 amendments that are irrelevant to this case are misleading and should not be a factor in any disqualification decision.

Respectfully submitted this 9th day of August, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Response in Opposition to Motion for Recusal to be mailed to:

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